

**D.N., Appellant**

**U.S. POSTAL SERVICE, POST OFFICE,  
Chesterland, OH, Employer**

*Appearances:*

*Alan J. Shapiro, Esq.*, for the appellant<sup>1</sup>

Office of Solicitor, for the Director

### Case Submitted on the Record

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge

**ALEC J. KOROMILAS, Alternate Judge**

VALERIE D. EVANS-HARRELL, Alternate Judge

On August 28, 2018 appellant, through counsel, filed a timely appeal from a June 20, 2018 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). As more than 180 days has elapsed from OWCP's last merit decision, dated May 30, 2017, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act<sup>2</sup> (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction over the merits of this case.<sup>3</sup>

<sup>1</sup> In all cases in which a representative has been authorized in a matter before the Board, no claim for a fee for legal or other service performed on appeal before the Board is valid unless approved by the Board. 20 C.F.R. § 501.9(e). No contract for a stipulated fee or on a contingent fee basis will be approved by the Board. *Id.* An attorney or representative's collection of a fee without the Board's approval may constitute a misdemeanor, subject to fine or imprisonment for up to one year or both. *Id.*; *see also* 18 U.S.C. § 292. Demands for payment of fees to a representative, prior to approval by the Board, may be reported to appropriate authorities for investigation.

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

<sup>3</sup> The Board notes that following the June 20, 2018 decision, OWCP received additional evidence. However, the Board's *Rules of Procedure* provides: "The Board's review of a case is limited to the evidence in the case record that was before OWCP at the time of its final decision. Evidence not before OWCP will not be considered by the Board for the first time on appeal." 20 C.F.R. § 501.2(c)(1). Thus, the Board is precluded from reviewing this additional evidence for the first time on appeal. *Id.*

## **ISSUE**

The issue is whether OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

## **FACTUAL HISTORY**

This case has previously been before the Board.<sup>4</sup> The facts and circumstances as presented in the Board's prior decisions are incorporated herein by reference. The relevant facts are as follows.

On September 30, 2000 appellant, then a 39-year-old part-time rural carrier associate, filed an occupational disease claim (Form CA-2) for bilateral carpal tunnel syndrome, which reportedly arose in the performance of duty on or about July 1, 1999. OWCP accepted the claim for mild bilateral carpal tunnel syndrome. Appellant stopped work on October 15, 2000 and received wage-loss compensation from OWCP on October 22, 2000. She resigned from the employing establishment, effective January 29, 2001, and obtained employment in the private sector. OWCP paid appellant wage-loss compensation for partial disability beginning January 2001.

By decision dated May 4, 2001, OWCP terminated appellant's wage-loss compensation and medical benefits effective that date. It found that the opinion of Dr. Sheldon Kaffen, a Board-certified orthopedic surgeon serving as an OWCP referral physician, constituted the weight of the evidence and established that she had no further disability or need for medical treatment due to her July 1, 1999 employment injury. In a November 27, 2001 decision, OWCP denied modification of its May 4, 2001 decision.<sup>5</sup>

Appellant appealed to the Board. By decision dated June 10, 2002, the Board reversed the May 4 and November 27, 2001 OWCP decisions terminating appellant's wage-loss compensation and medical benefits effective May 4, 2001.<sup>6</sup> The Board found that Dr. Kaffen's opinion was not based on a complete and accurate factual history and thus failed to constitute the weight of the evidence.

Subsequently, by decision dated October 23, 2002, OWCP again terminated appellant's wage-loss compensation and medical benefits effective that date. It found that the opinion of Dr. Alan H. Wilde, an orthopedic surgeon and OWCP referral physician, established that she had no further disability or need for medical treatment due to her bilateral carpal tunnel syndrome. An OWCP hearing representative, by decision dated July 23, 2003, affirmed the October 23, 2002 decision.

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<sup>4</sup> Docket No. 02-0553 (issued June 10, 2002); Docket No. 03-2054 (issued October 22, 2003).

<sup>5</sup> By decision dated October 24, 2001, OWCP denied appellant's request for an oral hearing before an OWCP hearing representative under 5 U.S.C. § 8124(b) as it was not made within 30 days.

<sup>6</sup> *Supra* note 4.

Appellant appealed to the Board.<sup>7</sup> By decision dated October 22, 2003, the Board reversed OWCP's termination of her compensation and medical benefits, finding that Dr. Wilde's opinion was equivocal and not based on objective testing.<sup>8</sup>

Thereafter, OWCP determined that a conflict in medical opinion existed between Dr. Todd S. Hochman, an attending Board-certified internist, and Dr. William R. Bohl, an OWCP referral physician and Board-certified orthopedic surgeon, regarding whether appellant had continued residuals of her accepted bilateral carpal tunnel syndrome.<sup>9</sup> It referred her to Dr. Dennis Glazer, a Board-certified orthopedic surgeon, for an impartial medical examination.

In a report dated May 16, 2016, Dr. Glazer reviewed appellant's history of injury and the medical evidence of record. On examination, he found a slightly positive Phalen's test bilaterally and a negative Tinel's sign without loss of hand strength. Dr. Glazer noted that a recent electromyogram (EMG) study showed a decrease in latency, but no loss of amplitude or denervation.<sup>10</sup> He found that appellant had no residuals of her right or left carpal tunnel syndrome based on his equivocal physical examination findings, lack of muscle atrophy, and the EMG study. Dr. Glazer opined that appellant could resume her usual employment without restriction.

By decision dated July 12, 2016, OWCP terminated appellant's wage-loss compensation and medical benefits effective that date. It found that the opinion of Dr. Glazer represented the special weight of the evidence and established that she had no further disability or need for medical treatment due to her accepted bilateral carpal tunnel syndrome.

Appellant, through counsel, requested a telephonic hearing, which was held before an OWCP hearing representative on March 15, 2017. By decision dated May 30, 2017, OWCP's hearing representative affirmed the July 12, 2016 decision.

In a July 6, 2017 progress report, Dr. Todd S. Hochman, a Board-certified internist, noted that an EMG and nerve conduction velocity (NCV) study showed "confirmed disease." On examination he found a positive Tinel's sign and swelling over the right wrist at the radial aspect. Dr. Hochman noted that appellant had an accepted claim for bilateral carpal tunnel syndrome.

An EMG/NCV study performed on September 15, 2017 by Dr. Sami E. Moufawad, Board-certified in pain medicine and physical medicine and rehabilitation, revealed bilateral mild focal median neuropathy consistent with mild carpal tunnel syndrome and evidence of mild cubital tunnel syndrome without axonal loss. The study showed an increase in medial neuropathy of the wrists with motor demyelination compared to a January 22, 2016 study.

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<sup>7</sup> By decision dated April 25, 2012, OWCP granted appellant a schedule award for two percent permanent impairment of each upper extremity. In a decision dated October 17, 2012, an OWCP hearing representative affirmed the April 25, 2012 decision.

<sup>8</sup> *Supra* note 4.

<sup>9</sup> OWCP initially referred appellant Dr. Timothy Nice, a Board-certified orthopedic surgeon, for an impartial medical examination. Dr. Nice, however, submitted his report to counsel before submitting it to OWCP, and thus it had found that it could not consider his report.

<sup>10</sup> A January 22, 2016 EMG study revealed "mild focal medial neuropathy in the medial nerves bilaterally compatible with mild carpal tunnel syndrome bilaterally" with no evidence of denervation.

Dr. Hochman, in a January 11, 2018 report, indicated that a recent EMG study showed “some progression of the carpal tunnel syndrome.” He found a positive Tinel’s sign with some ulnar tenderness on examination. Dr. Hochman noted appellant’s history of working for the employing establishment beginning in 1998 and found that she had developed bilateral carpal tunnel syndrome. He indicated that she worked part time.

On March 23, 2018 appellant, through counsel, requested reconsideration based on the newly submitted September 15, 2017 EMG study.

In a June 12, 2018 progress report, Dr. Hochman diagnosed bilateral carpal tunnel syndrome and noted that appellant had applied for a schedule award. He related that she had “persistent disease.”

By decision dated June 20, 2018, OWCP denied appellant’s request for reconsideration as she had not raised an argument or submitted evidence sufficient to warrant reopening her case for further merit review under section 8128(a). It found that Dr. Hochman’s progress reports were substantially similar to his previously submitted reports of record and that the EMG study failed to address the relevant issue of whether she had residuals of her employment injury.

### **LEGAL PRECEDENT**

Section 8128(a) of FECA vests OWCP with discretionary authority to determine whether to review an award for or against compensation. The Secretary of Labor may review an award for or against payment of compensation at any time on his own motion or on application.<sup>11</sup>

To require OWCP to reopen a case for merit review pursuant to FECA, the claimant must provide evidence or an argument that: (1) shows that OWCP erroneously applied or interpreted a specific point of law; (2) advances a relevant legal argument not previously considered by OWCP; or (3) constitutes relevant and pertinent new evidence not previously considered by OWCP.<sup>12</sup>

A request for reconsideration must also be received by OWCP within one year of the date of OWCP’s decision for which review is sought.<sup>13</sup> If OWCP chooses to grant reconsideration, it reopens and reviews the case on its merits.<sup>14</sup> If the request is timely, but fails to meet at least one of the requirements for reconsideration, OWCP will deny the request for reconsideration without reopening the case for review on the merits.<sup>15</sup>

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<sup>11</sup> 5 U.S.C. § 8128(a).

<sup>12</sup> 20 C.F.R. § 10.606(b)(3); *see also* *B.W.*, Docket No. 18-1259 (issued January 25, 2019).

<sup>13</sup> *Id.* at § 10.607(a). For merit decisions issued on or after August 29, 2011, a request for reconsideration must be received by OWCP within one year of OWCP’s decision for which review is sought. Federal (FECA) Procedure Manual, Part 2 -- Claims, *Reconsiderations*, Chapter 2.1602.4 (February 2016). Timeliness is determined by the document receipt date of the request for reconsideration as indicated by the received date in the integrated Federal Employees’ Compensation System (iFECS). *Id.* at Chapter 2.1602.4b.

<sup>14</sup> *Id.* at § 10.608(a); *see also* *M.S.*, Docket No. 18-1041 (issued October 25, 2018).

<sup>15</sup> *Id.* at § 10.608(b); *S.M.*, Docket No. 18-0673 (issued January 25, 2019).

## ANALYSIS

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

By decisions dated July 12, 2016 and May 30, 2017, OWCP terminated appellant's wage-loss compensation and medical benefits as the opinion of Dr. Glazer, the impartial medical examiner, established that she had no residuals of her accepted bilateral carpal tunnel syndrome. Appellant timely requested reconsideration on March 23, 2018.

The Board finds that appellant has not shown that OWCP erroneously applied or interpreted a specific point of law. Moreover, appellant has not advanced a relevant legal argument not previously considered. As such, she is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(3).<sup>16</sup>

The Board further finds that appellant has not submitted any relevant and pertinent new evidence not previously considered. Appellant submitted 2017 and 2018 progress reports from Dr. Hochman, who found that she had continued bilateral carpal tunnel syndrome. Dr. Hochman's reports, however, are substantially similar to his prior progress reports from 2016.<sup>17</sup> The Board has held that the submission of evidence that duplicates or is substantially similar to evidence already in the case record does not constitute a basis for reopening a case.<sup>18</sup>

Appellant further submitted a September 15, 2017 EMG/NCV study by Dr. Moufawad. The electrodiagnostic testing does not address the relevant issue of whether she was disabled or required further medical treatment due to her employment injury. As noted, the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.<sup>19</sup> Appellant, consequently, is not entitled to a review of the merits of her claim based on the third requirement under section 10.606(b)(3).<sup>20</sup>

The Board, accordingly, finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(3). Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.<sup>21</sup>

On appeal counsel argues that OWCP has the responsibility to develop the claim based on the newly submitted evidence. As discussed, however, appellant did not raise an argument or

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<sup>16</sup> *C.B.*, Docket No. 18-1108 (issued January 22, 2019).

<sup>17</sup> In a report dated March 15, 2016, Dr. Hochman noted an EMG/NCV showed findings consistent with carpal tunnel syndrome and diagnosed bilateral carpal tunnel syndrome.

<sup>18</sup> *See A.M.*, Docket No. 18-0716 (issued December 10, 2018).

<sup>19</sup> *See D.P.*, Docket No. 17-1446 (issued January 25, 2018).

<sup>20</sup> *S.C.*, Docket No. 18-0814 (issued January 18, 2019).

<sup>21</sup> *See L.A.*, Docket No. 18-1226 (issue December 28, 2018) (when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits).

submit relevant and pertinent new evidence sufficient to warrant reopening her case for further merit review.<sup>22</sup>

**CONCLUSION**

The Board finds that OWCP properly denied appellant's request for reconsideration of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

**ORDER**

**IT IS HEREBY ORDERED THAT** the June 20, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 7, 2019  
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board

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<sup>22</sup> *Id.*